Filed 12/12/01

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARSHALL BRYER et al., Plaintiffs, Cross-Defendants and Appellants; BETTY BRYER, Cross-Defendant and Appellant, v. ELLEN GREEN-VENABLE, Defendant, Cross-Complainant and Respondent; CIMARRON SERVICE CORPORATION OF NEVADA, Defendant and Respondent.	D035903 (Super. Ct. No. N080160)

APPEAL from a judgment of the Superior Court of San Diego County, Michael B. Orfield, Judge. Reversed and remanded in part; affirmed in part.

Marshall Bryer, individually and as general partner for El Norte Partnership (hereafter Marshall),[1] and his mother Betty Bryer (Betty) appeal a judgment finding that Ellen Green-Venable (Venable) forged a deed of trust, slandered title to real property and wrongfully foreclosed on the property and that the foreclosure company, Cimarron Service Corporation of Nevada (Cimarron), was negligent in processing the foreclosure. On appeal, Marshall contends the court erred in denying damages on the basis he should have paid Venable's demand and filed a lawsuit before the foreclosure; the court should have awarded the lost equity in the property or his repurchase price as damages; the court should have awarded as damages the attorney fees incurred to challenge the foreclosure and repurchase the property; the court erred in giving Venable a set-off from the surplus funds of the foreclosure; the court erred in denying an award for lost rents; and the court erred in not finding Venable's note was not usurious. Marshall and Betty also contend they were entitled to awards of attorney fees as prevailing parties pursuant to the terms of the installment note and deed of trust. We conclude substantial evidence supports the trial court's conclusion Marshall was not entitled to lost rents and the Venable loan was not usurious. We reverse and remand for a calculation of damages and attorney fees.

FACTS

Marshall and his wife, Barbara, owned a vending machine company. In the summer of 1996, they had an opportunity to expand their business by placing water

---

1 We use the first names of the parties for the sake of convenience. We intend no disrespect.

vending machines at a chain of five supermarkets. Based on their research, Marshall and Barbara anticipated they would net $13,500 per month from the machines. On July 8, 1996, they entered into a contract with the supermarket chain and then attempted to locate financing to purchase the machines. As of mid-July 1996, they still needed $20,000.

At one point, Barbara mentioned the vending machine opportunity to Venable and the fact they needed an additional $20,000.[2] Venable said she had $20,000. Eventually, an agreement, reduced to writing, was reached where Venable agreed to loan Marshall $20,000 at 21 percent interest per annum. The interest included the 10 3/8 percent interest she was charged for borrowing money from her Dean Witter investment account. The parties' installment note provided that Marshall would pay $2,500 per month due on the first of the month and if he defaulted, then Marshall's mother Betty, would pay $500 before the fifteenth day of the month until the principal and interest were paid. The printed installment note contained an acceleration clause providing that the full amount would be due upon a default but this provision was crossed out and initialed by Marshall. The note provided that payments would start in December 1996. The installment note was signed by Betty and Marshall. Venable was given a security interest in the water machines and the five-year supermarket contract. Marshall estimated the water vending machines were worth about $30,000 and the contract was worth about $5,000.

---

[2] Venable's children attended the same preschool as the Bryer children. Venable and Marshall developed a friendship which eventually led to a brief sexual relationship. Venable met Betty through Marshall and Barbara.

The machines were installed in September 1996. The revenue from the machines was less than projected. One of the machines was broken and never operated properly. Payments were made on Venable's note beginning in December 1996 at the rate of $500 per month and continuing through December 1997 for a total of $6,500. By January 1998, the supermarket chain had closed several of its stores, told Marshall they were canceling his contract and told him to pick up his machines. Marshall contacted Venable, explained to her what had happened and that he could not make the January 1998 payment unless he was able to relocate the machines. He offered to give her the machines, but she did not want them.

About January 19, 1998, Venable came to Marshall's home with a "Conditional Amendment" to the installment note that required Marshall to provide information in regard to the serial numbers, location, keys and other information about the water vending machines, reduced the interest rate to 10 percent and provided that a $20,000 lien would be placed "on all three real property homes owned by Marshall Bryer and/or Betty Bryer." Marshall refused to sign the Conditional Amendment because he was unwilling to give her a lien on any real property.

Venable took the Conditional Amendment to Marshall's mother, Betty. The Conditional Amendment was altered by handwritten interlineations to provide a $20,000 lien only on a rental property located on West El Norte Parkway in Escondido (El Norte property). Betty signed and dated the Conditional Amendment on January 19, 1998.

The El Norte property had belonged to Betty, but in 1995 Betty transferred ownership to Marshall and his wife. At the time of the transfer, Marshall and his wife

formed a partnership called El Norte Partnership and a trust called El Norte Trust. Title to the property was taken as El Norte Partnership for the El Norte Trust. After September 1995, Betty owned no interest in the property.

A few days later, on January 21, 1998, Venable had Betty sign a "Second Amendment" to the installment note providing for an end date for the loan of June 1, 1998, at which point Venable could collect payment in full with interest. The Second Amendment also reduced the interest rate to 10 percent and provided that Marshall and Betty consented to the recordation of a deed of trust on the El Norte property as additional security for the installment note. Marshall refused to sign this Second Amendment, so Venable forged his signature.[3] Venable obtained Betty's signature on a deed of trust to the El Norte Property. The deed has written on it "El Norte Partnership, as trustee" but correction tape was put over this stating "Betty Bryer, as trustee for the El Norte Trust, El Norte Partnership."[4]

On February 2, 1998, the deed of trust was recorded. In the intervening period, Venable was in touch with Cimarron and was investigating foreclosing on the El Norte property and was providing Cimarron with various documents.

---

3 Venable testified Marshall had always promised to give her a lien on real property and she was present when Marshall signed the document giving her a lien on the El Norte property.

4 Venable testified she believed El Norte Trust was a family trust and, based on her experience, she believed Betty probably still owned the property, retaining for herself a lifetime interest.

On March 6, 1998, Cimarron issued a Notice of Default (Notice) and election to sell the El Norte property under the deed of trust. The Notice stated $40,635 was due as of March 6, 1998. Marshall called Cimarron and told them he did not owe Venable $40,000 and that his mother did not own the property. Cimarron essentially ignored him and told him to talk to Venable.

Marshall contacted Venable who admitted he did not owe her $40,000, but she demanded payment of about $26,000. A few days later, Marshall obtained an oral promise of a $12,500 loan on his house and offered to pay Venable that amount immediately and to pay the remaining interest over the next 12 to 24 months.[5] He also offered to sell some of the water vending machines and give her the proceeds from the sale, but Venable refused; she wanted the entire amount immediately.

Upon the advice of counsel, Marshall filed for bankruptcy to stay a foreclosure of the property. During the course of the bankruptcy, Venable filed a motion to lift the stay so that she could foreclose on the El Norte property. Marshall's attorney failed to oppose the motion. Cimarron issued another Notice of Trustee's Sale, stating that the amount due was estimated to be $27,814.41. Marshall hired another attorney who wrote to both Cimarron and Venable, pointing out that Betty was not a trustee of the El Norte Trust and therefore did not have the power to issue a deed of trust.

---

[5] Marshall testified he intended the offer of $12,500 as full payment of the $20,000 principal in light of his prior payments totaling $6,500, but acknowledged at trial that he had miscalculated the amount, i.e., that $12,500 plus $6,500 totals only $19,000.

In late December 1998, the property was sold at a nonjudicial trustee sale for $37,000. Venable received $29,908.54 from the sale proceeds which included attorney fees. After payment of fees, Marshall received a check for about $7,000.

In early April 1999, Marshall repurchased the property for $48,705. He borrowed the money from Betty and agreed to repay her at 13.7 percent interest. At the time of trial, Betty was helping to pay the mortgage on the El Norte property.

At trial Marshall testified, at the time of the trustee sale, the property was worth about $175,000, there was a $125,000 mortgage on the property so the property had an equity value of about $50,000. He testified the property generated $1,250 in rent but the rent covered the mortgage payment, insurance and taxes so "[b]asically it was a wash." Marshall testified in opposing the foreclosure and up to his April 1999 repurchase of the property he had incurred approximately $8,500 in attorney fees.

Marshall presented an expert who testified Cimarron violated the standard of care. An expert was presented by Venable and Cimarron who disputed this conclusion.

Marshall sued Venable and Cimarron to set aside the trustee's sale, damages for a wrongful trustee's sale, cancellation of the trustee's deed, quite title, accounting, fraud, negligent misrepresentation, conspiracy, negligence, usury, slander of title and declaratory relief.[6] Venable cross-complained for fraud, conspiracy, intentional

---

[6] Marshall's complaint was filed in January 1999. Subsequently, Marshall dismissed some of his causes of action without prejudice. His cause of action for declaratory relief was dismissed as moot because the relief requested was incorporated in other causes of action.

infliction of emotional distress and indemnity on the basis Marshall had falsely promised to repay the loan within six months and to give her a lien on the El Norte property.

The trial court found there was a wrongful trustee's sale because the documents sent to Cimarron were forged; Cimarron was negligent in allowing the trustee's sale to take place; and there was a slander of Marshall's title. The court rejected Marshall's claims for an accounting, conspiracy and usury. The court ruled against Venable on her cross-complaint for fraud.

The court, however, awarded Marshall only very limited damages. The court awarded Marshall only $1,291.74. This amount represented the difference between the amount Venable received at the foreclosure sale ($29,908.54) less the amount that she should have received if the interest had not been compounded ($21,525.34) to which the court offset the $8,383.20 that Marshall had received from the trustee's sale. The court stated that Marshall "had significant opportunities to avoid the sale of the El Norte property" and that "[b]y failing to file a lawsuit and stay any foreclosure, and by significant missteps in the bankruptcy process, he caused a great deal of his own damages." The court stated that Marshall should have litigated title in the bankruptcy court or in another action prior to the sale and had he done so, he would have prevailed and avoided the sale of the property. The court concluded "Plaintiffs clearly failed to reasonably protect themselves from the sale of their property, and cannot now recover the full expense of repurchase." The court further stated that Marshall was not entitled to recover the repurchase price because there was "no evidence before the Court that

Plaintiffs paid for the repurchase," the evidence showed Betty paid for the repurchase, and there was "no evidence of any obligation to her."

The court denied any damages for lost rents because "there was no proof of any net profit on the rental." The court declined to award punitive damages on the slander of title action because "Venable's conduct, while knowingly, was more out of frustration than malice, especially given that her actions could not and did not immediately result in any damage to Plaintiffs," the court noting that "[i]t took 10 months of Venable's conduct to result in the sale of the El Norte property."

The court denied any damages for attorney fees because "there was no evidence presented as to the amount of fees reasonably necessary to get the property back." The court also denied an award of attorney fees to Marshall and Betty as prevailing parties because the deed of trust and Second Amendment were "null and void and, therefore, any attorney's fees provisions are null and void. . . ."

DISCUSSION

I

Damages for Repurchase or Lost Equity

Marshall contends the court erred in denying damages on the basis he failed to a file a legal action proceeding prior to the sale. We agree.

The trial court did not cite any authority to support its conclusion that Marshall's "missteps" in the bankruptcy proceeding and the fact 10 months had elapsed between the notice of default and trustee's sale should preclude Marshall from recovering the repurchase price.

We note that one doctrine that applies in equitable actions and looks to the plaintiff's conduct is the doctrine of laches. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 991.) Under the doctrine of laches, individuals "who neglect their rights may be precluded from obtaining relief in equity." (11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 14, p. 690.) "'The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.'" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68.) """The prejudice must be caused by the delay and may be of either a factual nature or some prejudice in the presentation of a defense."'" (*Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1348.)

Here, if the trial court's determination rested on the application of the laches doctrine, we would find an abuse of discretion. Marshall, immediately upon receiving the notice of default, objected to both Cimarron and Venable. When neither responded, upon the advice of counsel, he filed a bankruptcy action to stay the sale, and when Venable and Cimarron continued in their efforts to foreclose on the property, Marshall had his attorney write letters to both of them informing them of his objections. Marshall did not neglect his rights; he promptly and repeatedly informed Cimarron and Venable of his objections to the trustee's sale. The defendants were not prejudiced; they had clear notice of Marshall's objections and yet, at their own risk, proceeded with the trustee's sale.

Below, Venable argued the court's conclusion was supported by a plaintiff's duty to mitigate damages. Under this doctrine, "[w]here damage to person or property is

threatened or inflicted by either breach of contract or tort, the injured party has the active duty to use reasonable care and diligence to protect himself and minimize the loss. And if, by his own neglect, the damages are unnecessarily enhanced, he cannot recover the excess." (6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1382, p. 852.) This doctrine "does not apply where the measures necessary to avoid or lessen the damage would involve an unreasonably great effort, risk or expense, or would be impractical." (*Id*. at § 1384, p. 853.)

The doctrine of mitigation of damages generally applies to actions a plaintiff can take outside of filing the lawsuit such as: seeking medical treatment for an injury caused by defendant (see *McKinney v. Red Top Cab Co.* (1931) 113 Cal.App. 637, 641); seeking other employment when one has been fired (*Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1501; *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1386); seeking replacement goods when a commercial contract has been breached (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 756); notifying parents that their children are unlawfully "hacking" into a telephone company's system (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568-1569); or seeking to relet premises after a tenant has breached a lease (*Zanker Development Co. v. Cogito Systems Corp*. (1989) 215 Cal.App.3d 1377, 1381; *Sebastian International, Inc. v. Peck* (1987) 195 Cal.App.3d 803, 810).

The evidence here shows Marshall did attempt to mitigate the damages by immediately notifying Cimarron and Venerable that Betty did not hold title to the property and he had not consented to a lien being placed against the property. The

damages caused were not the result of Marshall's failure to mitigate, but Cimarron's negligence in failing to verify that Betty had authority to grant a deed of trust on the property and Venable's fraud in forging the Second Amendment and having Betty sign the deed of trust. If Venable or Cimarron had responded properly to Marshall's initial objections, they could have avoided the damages in their entirety. In other words, contrary to the trial court's finding that Marshall's "own conduct was a significant factor in the loss of the property," it was the conduct of Venable and Cimarron that caused the loss of the property by pursuing the trustee sale even after having received notice that the deed of trust was invalid.

Additionally, the trial court's requirement that Marshall was required to pay Venable the full amount of her demand and litigate title to the property and the validity of the documents prior to the trustee sale was unreasonable. We first note that the deed of trust contained a demand of over $40,000, an amount that was about twice as much as the court determined Venable was entitled to. There was other evidence presented that Venable was demanding $26,000 or $27,000, again amounts significantly above the amount the court determined Venable was due on the July 16, 1996 installment note. More importantly, the installment note between the parties did not contain any due date or acceleration clause requiring full payment of the loan upon a default. An acceleration clause was contained only in the forged Second Amendment. Thus, as of the March 6, 1998 Notice, Venable was only entitled to the missed January and February 1998 payments (the installment note provided Marshall's payment could be made up to the 10th day of the month and, if he defaulted, Betty's payment was due by the 15th day of

the month). Additionally, it was undisputed that during that time period, Marshall was having significant financial problems due to the closure of the supermarkets. The court's requirement that Marshall should have paid the full amount of a loan that was not due and was well in excess of the amount he then owed (two missed payments), was unreasonable.[7]

Moreover, the court ignored that a suit in equity is the traditional, well-recognized and approved method of challenging a nonjudicial foreclosure. (See *Anderson v. Heart Federal Sav. & Loan Assn.* (1989) 208 Cal.App.3d 202, 210; *Munger v. Moore* (1970) 11 Cal.App.3d 1, 6.) In other words, the law authorizes the very suit brought by Marshall and neither requires payment of money demanded nor the filing of a suit prior to the occurrence of the trustee sale.

Finally, we note that by precluding Marshall from obtaining any damages relating to the repurchase of the house on the basis he should have paid Venable the full amount she claimed and then litigated title, the court essentially rewarded Venable's fraud and Cimarron's negligence since the court allowed them to avoid damages resulting from their fraud and negligence.

---

[7] We also note that given the posture of this case, i.e., a negligent foreclosure company and a debtor willing to commit forgery, that had Marshall provided Cimarron with copies of the trust documents showing Bryer was not an owner of the property, it is possible that Venable would merely have forged a new document, signing the deed of trust with Marshall and Betty's names, and representing to Cimarron that she now had a valid deed of trust. In other words, mitigation of this type by Marshall may still not have avoided the sale.

We conclude the court erred in denying Marshall the costs he incurred to repurchase the property on the basis he had not filed suit prior to the trustee's sale or had not tendered the amount Venable was demanding.

The trial court also denied an award of the repurchase price because "there [was] no evidence" showing Marshall, rather than Betty, paid to repurchase the property. The court stated that Marshall "apparently borrowed the repurchase money from his mother, with no evidence of the obligation to repay." Venable contends the court's determination was correct; no award should be made for damages that are merely speculative.

Initially, we note that the court in its statement of decision seems to recognize the purchase price was a loan; the court calls it so. Nothing in the court's own statements or in the record indicates that Betty purchased the property for herself or that the money was intended as a gift. Further, contrary to the court's determination, the record shows there was evidence of an obligation to repay. Marshall testified that he had borrowed the money from his mother and that he was obligated to repay her at 13.7 percent interest. The repurchase price was not speculative, it was evidenced by a check, and was a valid measure of damages caused by the wrongful trustee's sale. (See *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 ["In fraud cases involving the 'purchase, sale or exchange of property,' the Legislature has expressly provided that the 'out-of-pocket' . . . measure of damages should apply"].)

Alternatively, even if there was evidence in the record a determination that Betty had repurchased the house for herself or had made a gift of the money to Marshall, then Marshall should have been allowed to recover the amount of equity in the El Norte

property he lost as a result of the sale. (See *Munger v. Moore, supra,* 11 Cal.App.3d 1, 11 ["[W]here a mortgagee or trustee makes an unauthorized sale under a power of sale he and his principal are liable to the mortgagor for the value of the property at the time of the sale in excess of the mortgages and liens against said property"].) Marshall testified there was approximately $50,000 equity in the house which he lost as a result of the trustee's sale; an amount not unsurprisingly similar to the repurchase price. This amount represented real, valid damages caused by the wrongful trustee's sale. The fact that Betty had purchased the house for herself or made a gift to Marshall of the $48,000 repurchase price should not relieve Cimarron and/or Venable of damages for the lost equity. No offset should be made in either case. If Betty purchased the house for herself then Marshall received no benefit from the purchase, i.e., he did not get the property. If Betty gave Marshall a gift of $48,000, Marshall should receive the benefit of her gift; the benefit of her gift should not be shifted to Venable and Cimarron whose fraud and negligence caused these damages.

In sum, we conclude the court erred in failing to award Marshall any damages representing the repurchase price or lost equity in the property.

Reversal is merited on this ground.

II

Lost Rental Value

Marshall contends the court erred in failing to award him rents lost between the trustee's sale and his repurchase of the property. We disagree.

Substantial evidence in the record supports the court's determination. At trial, Marshall testified the property generated $1,250 in rent but the rent covered the mortgage payment, insurance and taxes so "[b]asically it was a wash." In other words, Marshall conceded that he had not lost any profits as a result of the foreclosure sale.

No reversal is merited on this ground.

III

Attorney Fees as Damages

The trial court denied any award of attorney fees as damages because "there was no evidence presented as to the amount of fees reasonably necessary to get the property back." This finding is not supported by substantial evidence.

In cases involvi ng slander of title and wrongful foreclosure, a property owner is entitled to recover as damages reasonable attorney fees incurred to remove the cloud on the title and recover the property. (See *Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 437; *Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1216.)

The undisputed evidence and the reasonable inferences from that evidence support only one conclusion, that is, that Marshall did, in fact, incur attorney fees in his attempt to stop the trustee's sale and recover the El Norte property. One of Marshall's attorneys, Lillian Godone-Maresca, testified about her efforts to avoid the trustee's sale and letters from Godone-Maresca to Cimarron and Venable were admitted into evidence. Further, Marshall, when asked about the attorney fees he had incurred, testified he paid Godone-Maresca "[a]pproximately $500" and paid the law firm of Milberg and DePhillips a little over $8,000 which covered the time period up to the April 1999 repurchase of the

property.[8] Neither Venable nor Cimarron presented any evidence disputing these amounts. Thus, there was evidence presented indicating that Marshall had incurred about $8,500 in attorney fees as a result of Venable's fraud and Cimarron's negligence.

Given the record presented, there was no reasonable basis to deny an award of *any* attorney fees as damages. If the court believed that some of the fees were not reasonably related to the wrongful trustee's sale (e.g., related to other financial issues involved in the bankruptcy proceeding), the court could have reduced the amount of the award, but the court had no basis for concluding Marshall was not entitled to any attorney fees. Further, to the extent the court denied fees on the basis that Marshall might have pursued other remedies (e.g., paying the amount of Venable's demand and litigating title in state or federal court prior to the trustee's sale), we have already explained requiring these actions as a prerequisite to recovering damages from Venable and/or Cimarron was unreasonable. Since attorney fees are an element of damages, imposing such a requirement on the recovery of attorney fees expended to challenge the foreclosure and recover the property would likewise be unreasonable.

Remand is necessary to allow the court to make an award of reasonable attorney fees as damages.

---

[8] Marshall apparently did not present any documentary evidence, e.g., attorney billing sheets, invoices, or cancelled checks in support of his attorney fees damage claim.

IV

Usury

Marshall contends the court erred in finding the loan was not usurious.

The California Constitution provides that, except as to certain enumerated classes of persons not involved here, a lender shall not receive more than 10 percent per annum upon any loan or forbearance of money. (Cal. Const., art. XV, § 1, subd. (1); *Forte v. Nolfi* (1972) 25 Cal.App.3d 656, 678.) A note is usurious if it provides for the maximum legal rate of interest and for compounding the interest more frequently than annually. (See *Heald v. Friis-Hansen* (1959) 52 Cal.2d 834, 840.)

"The essential elements of usury are: (1) The transaction must be a loan or forbearance; (2) the interest to be paid must exceed the statutory maximum; (3) the loan and interest must be absolutely repayable by the borrower; and (4) the lender must have a willful intent to enter into a usurious transaction. [Citations.] The element of intent is narrow. '[T]he intent sufficient to support the judgment [of usury] does not require a conscious attempt, with knowledge of the law, to evade it. The conscious and voluntary taking of more than the legal rate of interest constitutes usury and the only intent necessary on the part of the lender is to take the amount of interest which he receives; if that amount is more than the law allows, the offense is complete.'" (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 798.)

"The word 'interest' as used in the usury law includes any bonus, commission, or any other form of compensation paid to the lender for the use of the money borrowed, but it does not include expense items for investigating, appraising, inspecting and otherwise

servicing the loan." (*Cambridge Dev. Co. v. U.S. Financial* (1970) 11 Cal.App.3d 1025, 1028.) "Where a lender charges a fee in addition to interest in connection with making a loan, it does not necessarily follow the usury laws have been violated even if the combined charges exceed the proscribed limit. 'The Usury Law does not purport to fix or limit the legitimate expense or service charge that may properly be borne by the borrower.'" (*Ibid*.) "'[T]he law is settled that a loan is not rendered usurious where the lender's agent without the knowledge, consent, authorization or ratification of the lender, collects a fee for his own benefit.'" (*Forte v. Nolfi, supra,* 25 Cal.App.3d 656, 682.) Without violating the usury laws, a lender may charge "an additional amount representing interest actually paid by the lender to a third party from whom he secures the money." (*Burr v. Capital Reserve Corp*. (1969) 71 Cal.2d 983, 992.)

"'The usurious character of a transaction is determined by the amount agreed to be paid, agreed at the time of making the loan.'" (*Cambridge Dev. Co. v. U.S. Financial, supra,* 11 Cal.App.3d 1025, 1031.) "[T]he question of whether a transaction is usurious is generally a mixed question of fact and law." (*Ghirardo v. Antonioli, supra,* 8 Cal.4th 791, 800.)

The trial court found that the 21 percent interest in the installment note was not usurious because it represented the parties' agreement that Venable be paid 10 percent interest on the $20,000 loan plus Venable's cost (10 3/8 percent interest) to borrow the funds from Dean Witter. The court concluded Venable lacked an intent to collect a usurious rate of interest. Substantial evidence supports this determination; Marshall's

testimony at trial established this was the parties' agreement.[9] A representative from Dean Witter testified Venable was charged 10 3/8 percent interest on the loan until February 1997 when the interest charge was increased to 10 5/8 percent. The loan was fully paid in August 1998.

Marshall nonetheless contends the note was usurious and that Venable had the intent to collect a usurious rate of interest based on her subsequent acts in trying to collect interest compounded monthly and in her receipt of over $29,000 from the trustee's sale. As we pointed out above, the usury determination is to be based on the parties' intent at the time the loan was made. At the time the loan was made, the installment note did not provide for compounded interest so the court allowed Venable only simple interest. Similarly, from the proceeds of the trustee's sale, the trial court ruled Venable was only entitled to simple interest on the loan ($21,525.34) not the amount she collected at the trustee's sale ($29,908.54). To the extent Marshall argues that Venable collected more

---

9 Note that the parties rounded off the charge of the cost to obtain the money from Dean Witter from 10 3/8 percent to 11 percent. Marshall does not appear to base his usury claim on the fact that Venable collected a fraction of a percent more than her Dean Witter loan. Marshall argues other evidence supports his claim that the interest charge was usurious. He points to evidence that: Venable was not required to liquidate her investment account to obtain the money; she did not make any payments on the Dean Witter loan but had the amounts deducted from her Dean Witter investment account; and, the loan was essentially paid off by April 1997 except for $1,704. He contends her "net cost to borrow the funds from her brokerage account was 4-3/8th percent." We find this argument unpersuasive since the fact that the increases in her investments were sufficient to cover all or part of the payments on the loan does not necessarily support a conclusion Dean Witter charged a lesser interest rate; had the deductions not been made from her account, presumably she would have earned additional money on that amount.

than this amount due to the court's offset of the surplus check from the trustee's sale, we discuss that matter in part V, *post*, and conclude Venable was not entitled to that offset.

No reversal is merited on this ground.

V

Offset of Surplus Check

The trial court awarded Marshall $1,291.74 in damages. The court calculated this amount by first taking the amount Venable received from the trustee's sale ($29,908.54) and subtracting the amount she should have received had the interest been calculated at 21 percent simple interest ($21,525.34). This resulted in a difference of $8,383.20. The court, however, then subtracted the amount of the surplus check Marshall received from the sale (approximately $7,000) to arrive at a conclusion Marshall was entitled to damages of only $1,291.74. This calculation was clearly erroneous. The surplus check belonged entirely to Marshall; it represented the amount that the buyer paid at the trustee's sale above the amount of Venable's demand. Venable never had a right to that money. Even if this had been a legitimate trustee's sale, Venable would have been entitled only to the amount of her demand and no part of the surplus. By offsetting the surplus check, the court improperly shifted $7,000 of the surplus from Marshall to Venable.

On remand, the court should not offset any surplus from the trustee's sale to Venable.[10]

VI

Attorney Fees to Marshall as the Prevailing Party

The trial court denied an award of attorney fees to Marshall as a prevailing party because the deed of trust and Second Amendment were "null and void and, therefore, any attorney's fee provisions are null and void . . . ." The court erred.

The heart of this action was Marshall's claim that the Second Amendment and deed of trust, both of which contained attorney fee provisions, were unenforceable. It is

---

10 We also note that in calculating damages, the court offset the amount of Venable's loan against the proceeds of the trustee's sale although she had not sought an offset in her answer or cross-complaint. In effect, the court, although finding Venable had committed forgery and had wrongfully foreclosed on the property, nonetheless gave Venable the benefits of her forgery, i.e., a note with an acceleration clause and secured by the El Norte property. Under the terms of the installment note agreed to by the parties, if Marshall defaulted, Venable was entitled to $500 a month from Betty and to a security interest in the water machines. Under these terms, even at the time the court initially filed its statement of decision in March 2000, Venable was not entitled to the full amount of the note; she was entitled to only $13,500 (27 payments of $500 from January 1998 to March 2000).

A court in equity has discretion to order a set-off. (*Abatti v. Eldridge* (1980) 112 Cal.App.3d 411, 416.) However, a set-off should be denied if it results in inequity or frustrates a strong public policy. (*Prudential Reinsurance Co. v. Superior Court* (1992) 3 Cal.4th 1118, 1151 (dis. opn. of Kline, J.); *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 367.) In this case, we have some qualms about the set-off, given that it rewarded Venable's fraud and essentially gave her a secured interest in the property. The set-off here allowed Venable to profit by self-help, forgery and Cimarron's negligence. We do not, however, decide this issue since Marshall does not specifically raise the propriety of the set-off beyond noting Venable did not have a secured interest in the property. This issue perhaps could be appropriately raised during remand as part of the recalculation of damages.

well established that if a party would have been entitled to attorney fees based on showing an instrument is valid, the opposing party is entitled to attorney fees for showing the instrument was unenforceable. (See *Valley Bible Center v. Western Title Ins. Co.* (1983) 138 Cal.App.3d 931; *Winnett v. Roberts* (1986) 179 Cal.App.3d 909, 923.) Here, if Venable had prevailed, i.e., shown that the Second Amendment and deed of trust were valid and enforceable, she would have been entitled to attorney fees under the provisions contained in the installment note and deed of trust. Therefore, Marshall, as prevailing party, is entitled to attorney fees pursuant to the terms of the agreement and Civil Code section 1717. Furthermore, Marshall is entitled to his attorney fees on appeal and on remand.

Reversal and remand is merited on this ground.

VII

Attorney Fees to Betty as Prevailing Party on Venable's Cross-Complaint

After opening statements, the trial court granted a motion for nonsuit in favor of Betty and dismissed Venable's cross-complaint in its entirety as it related to Betty. The trial court awarded Betty $822.48 in costs on Venable's cross-complaint but denied Betty's claim for attorney fees as a prevailing party on the ground the documents containing the attorney fee provisions were void. As we explained in part VI, *ante*, this case revolved around the enforceability of the Second Amendment and deed of trust, and Betty, as prevailing party, pursuant to the terms of the Conditional Amendment and Civil

Code section 1717 was entitled to an award of reasonable attorney fees despite the conclusion the particular documents were unenforceable.

Reversal and remand is merited on this ground.

DISPOSTION

The cause is remanded for a recalculation of the damages owed to Marshall and for an award of attorney fees to Marshall and Betty as prevailing parties. In all other respects, the judgment is affirmed. Marshall and Betty are to recover their costs and attorney fees on appeal.

KREMER, P. J.

WE CONCUR:

HALLER, J.

McINTYRE, J.